in The

Supreme Court of The United States

GATES KIDD, et Al.,
Appellants,

vs.

GEORGE F. McCANLESS,
Appellee.

No. 36651

In the Supreme Court
of the
State of Tennessee

APPENDIX

in The

Supreme Court of The United States

GATES KIDD, et Al.,
Appellants,

vs.

GEORGE F. McCANLESS,
Appellee.

No. 36651

In the Supreme Court
of the
State of Tennessee

REHEARING DENIED

GATES KIDD, ET AL.,

vs.

GEORGE F. McCANLESS, Attorney General of the State of Tennessee, ET AL.

Supreme Court of Tennessee.

April 5, 1956.

Rehearing Denied June 8, 1956.

Knox Bigham, James M. Glasgow and Jack Wilson, Asst. Attys. Gen., for appellants.

Haynes Miller and Mayne Miller, and Kent Herrin, Johnson City, Peter Hampton, Elizabethton, Hobart F. Atkins, Knoxville, Maclin P. Davis, Jr., and Barksdale, Hudgins & Osborn, Nashville, for appellees.

SWEPSTON, Justice.

This is an appeal by the Attorney General from a decree overruling certain grounds of appellants' demurrer to the original bill, and declaring that the legislation providing for the apportionment of Senators and Representatives in the General Assembly, the same being Chapter 122 of the Public Acts of 1901, as amended, now codified as Sections 3-101 et seq. of Tennessee Code Annotated, has expired and is no longer effective.

The ultimate question involved is obviously of great public importance, and we have given the same the study to which the question is entitled. Examination of the Chancellor's opinion discloses that he likewise gave the matter serious and extended study and consideration.

In the view that we take of the matter, however, it will not be necessary to state at length and in detail the various pleadings filed by the numerous parties involved in the litigation, nor will it be necessary to discuss the numerous questions of law raised by the demurrers and passed upon by the Chancellor.

The suit was filed on March 8, 1955, by Gates Kidd and four other voters and residents of Washington County, Tennessee, along with six voters and residents of Carter County, and two voters and residents of Davidson County, against the Attorney General of Tennessee, the Secretary of State, the members of the State Board of Elections, the members of the Republican State Primary Election Commission, the members of the Democratic State Primary Election Commission, the members of the Washington County Election Commission, the Carter County Election Commission,

and the Davidson County Election Commission. By their bill they prayed, in addition to proces and general relief, a declaratory judgment of the . .rt declaring the Apportionment Act of 1901, as amended, to be unconstitutional for the following reasons: (1) no census of qualified voters was made as required by Section 4 of Article II of the Constitution; (2) the Act was unconstitutional and discriminatory when enacted; (3) the Senate Joint Resolution adopted by the Legislature in 1901 was not followed when said Act was enacted by the General Assembly; (4) the Apportionment Act of 1901 became unconstitutional and obsolete in 1911 because a new enumeration and apportionment was not made in that year; and (5) because the three counties where the complainants reside and vote are now entitled to greater representation in the Legislature than is afforded them by said Act. The bill alleges and charges because of this last assigned reason the respective complainants who reside and vote in their respective counties are denied the right to equal franchise and suffrage. The bill further alleges in support of these charges that a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives. The bill alleges also that the defendants will continue to conduct elections for members of the General Assembly according to said Act unless they are restrained by the court.

The bill seeks an injunction restraining the defendants from holding any election under said alleged unconstitutional Act either in 1956 or thereafter. In the

alternative the bill prays either (a) that a writ of mandamus issue ordering and compelling the defendants, State Board of Election, Democratic and Republican Primary Election Commissions, and the County Election Commissioners of Carter, Washington and Davidson Counties to prepare for a general election at large in 1956, wherein every qualified voter of the State would have an equal right to vote for every Representative and every Senator to serve in the 1957 General Assembly or any subsequent General Assembly, or (b) that by decree this Court mathematically reapportion the State of Tennessee and order the defendant Election Commissioners to prepare for and conduct the 1956 election of Representatives and Senators of the State in accordance with the decree mathematically reapportioning the State.

There was an answer and cross-bill filed by the Republican State Primary Election Commission and others seeking virtually the same relief as prayed for in the original bill.

The cross-bill was dismissed on demurrer of some of the defendants and on motion as to others.

The Attorney General filed a demurrer setting out 14 grounds, some of which the court sustained, and some of which were overruled.

The Chancellor correctly denied the relief prayed for under the alternative prayers (a) and (b), supra. There is no provision of law for election of our General Assembly by an election at large over the State. The citation of Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795, is not in point, because the case dealt

with the election of members of the National House of Representatives which is controlled by Article I, Section 2, under which an election at large is permitted in the absence of a redistricting act.

Quite clearly, also, the Governor has no power to reapportion the State for election of our General Assembly.

The Chancellor entertained the bill, however, for the purpose of rendering a declaratory judgment and thereby overruled the tenth and fourteenth grounds of the Attorney General's demurrer which are respectively that the court will not declare a statute unconstitutional if the result will be to disrupt the orderly processes of government, and that the present legislation providing for the apportionment of the Senators and Representatives in the General Assembly is not unconstitutional for any of the reasons stated in the bill.

In his opinion the Chancellor said:

"The Attorney-General has contended in the 10th ground of demurrer that the Court ought not to declare the law in question invalid or unconstitutional because chaos and confusion would result. But how is this so?

"This Court is entitled to presume and will presume that when it has exercised its constitutional duty in this proceeding to declare that there is no authority for the holding of an election for the members of the General Assembly in 1956, that the other two coordinate branches of our government will likewise exercise their duty under the

Constitution to provide orderly government for the people within their power to do so; that the Governor, therefore, will exercise his constitutional power and duty to call the Legislature into special session for the purpose of making an enumeration and reapportionment as required by the Constitution; that the Legislature, in turn, its power and duty having been declared herein, will exercise and perform the same by making a proper enumeration and apportionment. That the present General Assembly may thus act as a *de facto* body, the Court entertains not the slightest doubt. See State v. Cunningham, supra [81 Wis. 440, 51 N.W. 724, 15 L.R.A. 561], wherein the Court pointed out that the last legislature selected under the invalid act might lawfully be reassembled to pass a valid act of apportionment. The *de facto* doctrine is well established in Tennessee, particularly in matters involving public policy and necessity. Beaver v. Hall, 142 Tenn. 416, 433, 217 S.W. 649.

"That such result will not occur, is inconceivable to this Court.

"For these reasons, the Court is of the opinion that the injunctive relief prayed in the bill to restrain the defendants from holding or conducting an election for members of the General Assembly in 1956, or subsequently, is prematurely sought and will be denied. See Maryland Theatrical Corp., v. Brennan, 180 Md. 377, 24 A.2d 911."

[1] Thus it is apparent that the Chancellor correctly recognized, as he had already done theretofore in the opinion, that the courts have no power to compel either the legislative or the executive department to perform the duties committed exclusively to their respective domains by the fundamental law. He simply made a declaration that we have no valid reapportionment statute and then fell back on the *de facto* doctrine in order to avoid the otherwise necessary conclusion that by reason of the invalidity of the Act of 1901 we would no longer have any lawfully elected members of the General Assembly.

[2] Pretermitting all other questions discussed by the Chancellor and especially the question of whether he had jurisdiction under the declaratory judgment statute, we think the Chancellor was in error in applying the *de facto* doctrine. In the first place the case of Beaver v. Hall, cited by the Chancellor, in which the *de facto* doctrine is dealt with, the syllabus and the authorities discussed in the opinion show that there can be a *de facto* body or office only until there has been a judicial determination of the invalidity of same.

[3] In Ridout v. State, 161 Tenn. 248, at page 270, 30 S.W.2d 255, 71 A.L.R. 830, there are set out those instances where the doctrine is not applied. One instance is where either the person or body is not acting in good faith and the public knows of the want of authority there can be no *de facto* doctrine. 43 Am.Jur. 241, Section 495, in which it is said the general rule is that the acts of a *de facto* officer are valid as to third persons and as to the public only until his title to the office is adjudged insufficient, etc. Id., 244, Section 496.

Secondly, State v. Cunningham, relied on by the Chancellor, is to be found in 81 Wis. 440, 51 N.W. 724, 15 L.R.A. 561. That case applied the *de facto* doctrine exactly as the Chancellor has applied it here. However, in a much later case, State ex rel. Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610, that doctrine was rejected in the following language, at page 612 of the N.W. Reporter:

> "The reasons advanced in the argument made by the learned attorney general are inconclusive and if followed to their logical conclusion, would bring the government of the state into a legal cul-de-sac because of the elimination for the time being at least, of one of the equal co-ordinate branches of our government. It would destroy our constitutional equilibrium. As suggested, if ch. 27, Special Session, 1931 had become void and legislators elected since 1941 were not chosen from legal and constitutional legislative districts, then would we have a qualified and lawful body to enact a valid reapportionment statute? It is unnecessary, because of the validity of ch. 27, to rely on a theory that legislators elected to office from unconstitutional or non-existent districts, have by some doctrine of de facto officialdom based on de facto legislative districts, a right to exercise the important duties necessarily entering into a fair and just apportionment. Once it is determined that the present incumbents are not de jure officers, they have no color of authority and could not serve as de facto officers. 46 C.J. § 367, p. 1054; Ekern v. McGovern, 1913, 154 Wis. 157, 142, N.W. 595, 46 L.R.A.N.S., 796."

[4] It seems obvious and we therefore hold that if the Act of 1901 is to be declared unconstitutional, then the *de facto* doctrine cannot be applied to maintain the present members of the General Assembly in office. If the Chancellor is correct in holding that this statute has expired by the passage of the decade following its enactment then for the same reason all prior apportionment acts have expired by a like lapse of time and are non-existent. Therefore we would not only have any existing members of the General Assembly but we would have no apportionment act whatever under which a new election could be held for the election of members to the General Assembly.

It seems hardly necessary to comment on the fact that the Constitution limits the number of Representatives to 99 and the number of Senators to 33, to be apportioned by the Legislature according to the number of voters in the various Districts throughout the State.

The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present Legislature and the means of electing a new one and ultimately bring about the destruction of the State itself.

Under the allegations of the bill this Act was invalid at the time it was enacted, but the bill fails to allege the existence of a prior valid apportionment act to fall back upon. In that situation the authorities are practically unanimous in holding that a court will not declare such a statute invalid. In Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37, 32 L.R.A. 578, the Court said that the effect of striking down an apportionment statute under those circumstances would be to destroy the State Government. See also State ex rel. Winnie v.

Stoddard, 25 Nev. 452, 62 P. 237, 51 L.R.A. 229. In State ex rel. Sullivan v. Schnitger, 16 Wyo. 479, 95 P. 698, at page 708, a number of cases are cited for the proposition that the court will not declare an apportionment act invalid unless there is a prior valid act on which they may fall back.

We are therefore of the opinion that the Chancellor was in error in overruling the tenth ground of the Attorney General's demurrer. His decree is accordingly reversed, and the bill is dismissed at the cost of complainants.

OPINION ON PETITION TO REHEAR

(Filed June 8, 1956)

DAVID S. LANSDEN, Clerk,
Supreme Court of Tennessee

GATES KIDD, ET AL.,

v.

GEORGE F. McCANLESS, Attorney General of the State of Tennessee, ET AL.

DAVIDSON EQUITY

Hon. Thomas Wardlaw Steele, Chancellor

For the Appellees:

Hayes Miller & Mayne Miller
Johnson City, Tennessee;

Kent Herrin
Johnson City, Tennessee;

Peter Hampton
Elizabethton, Tennessee;

Hobart Atkins
Knoxville, Tennessee;

Maclin P. Davis
Nashville, Tennessee;

Barksdale, Hudgins & Osborn
Nashville, Tennessee.

For the Appellants:

Knox Bigham
James M. Glasgow
Jack Wilson
Assistant Attorneys General
Supreme Court Building
Nashville 3, Tennessee.

Gates Kidd and others have filed their petition to rehear. The gist of same is that they assert it was unnecessary for the Chancellor to rely upon the defacto doctrine because it is alleged that the Legislature owes

its existence to the Constitution and secondly, that the original bill did not challenge the right of any person presently a member of the General Assembly to continue to serve as a member of that body, leaving the inference to be drawn that the Court in its original opinion decided questions not raised by the pleadings.

It should be perfectly obvious to any lawyer that, while the Legislature exists as a department of government by virtue of the Constitution, yet the members individually hold office by virtue of election held pursuant to law, especially apportionment statutes. Hence, as we held in the original opinion, if the last reapportionment act be held invalid, then the present members of the General Assembly have not been dejure officers but only defacto and under well established authority could no longer be even defacto officers after a judicial decision declaring the statute invalid.

It is also well understood among the legal fraternity that courts do not and should not indulge in the mental exercise of deciding non-determinative points but should decide only such matter or matters as are determinative of the lawsuit. The 10th ground of the demurrer raised a question which the Court considered to be determinative of the whole controversy and we accordingly confine the decision to that one point. It comes as no surprise that petitioners do not agree with the opinion of the Court but that alone is not a sufficient reason for granting a rehearing. With due deference to counsel we must therefore overrule the petition to rehear.

/s/ JOHN E. SWEPSTON
JOHN E. SWEPSTON, J.

THE STATUTE ATTACKED

3-101. *Composition—Counties electing one representative each.*—The general assembly of the state of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters each of the following counties shall elect one (1) representative, to wit: Bedford, Blount, Cannon, Carroll, Chester, Cocke, Claiborne, Coffee, Crockett, DeKalb, Dickson, Dyer, Fayette, Franklin, Giles, Greene, Hardeman, Hardin, Henry, Hickman, Hawkins, Haywood, Jackson, Lake, Lauderdale, Lawrence, Lincoln, Marion, Marshall, Maury, Monroe, Montgomery, Moore, McMinn, McNairy, Obion, Overton, Putnam, Roane, Robertson, Rutherford, Sevier, Smith, Stewart, Sullivan, Sumner, Tipton, Warren, Washington, White, Weakley, Williamson and Wilson. (Acts 1881 (E. S.) ch. 5, Section 1; 1881 (E. S.), ch. 6, Section 1; 1901, ch. 122, Section 2; 1907, ch. 178, Sections 1, 2; 1915, ch. 145; Shan., Sec. 123; Acts 1919, ch. 147, Sections 1, 2, 1925 Private ch. 472, Section 1; Code 1932, Section 140; Acts 1935, ch. 150, Section 1; 1941, ch. 58, Section 1; 1945, ch. 68, Section 1; C. Supp. 1950, Section 140.)

3-102. *Counties electing two representatives each.*—The following counties shall elect two (2) representatives each, to wit: Gibson and Madison. (Acts 1901, ch. 122, Section 3; Shan., Section 124; mod. Code 1932, Section 141.)

3-103. *Counties electing three representatives each.*—The following counties shall elect three (3) representatives each, to wit: Knox and Hamilton. (Acts 1901, ch. 122, Section 4; Shan., Section 125; Code 1932, Section 142.)

3-104. *Davidson County.*—Davidson county shall elect six (6) representatives. (Acts 1901, ch. 122, Section 5; Shan., Section 126; Code 1932, Section 143.)

3-105. *Shelby County.*—Shelby county shall elect seven (7) representatives (Acts 1901, ch. 122, section 6; Shan., section 126a1; Code 1932, section 144.)

3-106. *Joint representatives.*—The following counties jointly, shall elect one representative, as follows, to wit:

First district—Johnson and Carter.

Second district—Sullivan and Hawkins.

Third district—Washington, Greene and Unicoi.

Fourth district—Jefferson and Hamblen.

Fifth district—Hancock and Grainger.

Sixth district—Scott, Campbell, and Union.

Seventh district—Anderson and Morgan.

Eighth district—Knox and Loudon.

Ninth district—Polk and Bradley.

Tenth district—Meigs and Rhea.

Eleventh district—Cumberland, Bledsoe, Sequatchie, Van Buren and Grundy.

Twelfth district—Fentress, Pickett, Overton, Clay and Putnam.

Fourteenth district—Sumner, Trousdale and Macon.

Fifteenth district—Davidson and Wilson.

Seventeenth district—Giles, Lewis, Maury and Wayne.

Eighteenth district—Williamson, Cheatham and Robertson.

Nineteenth district—Montgomery and Houston.

Twentieth district—Humphreys and Perry.

Twenty-first district—Benton and Decatur.

Twenty-second district—Henry, Weakley and Carroll.

Twenty-third district—Madison and Henderson.

Twenty-sixth district—Tipton and Lauderdale.

Twenty-seventh district—Shelby and Fayette (Acts 1901, ch. 122, section 7; 1907, ch. 178, sections 1, 2; 1915, ch. 145, sections 1, 2; Shan., section 127; Acts 1919, ch. 147, section 1; 1925 Private, ch. 472, section 2; Code 1932, section 145; Acts 1933, ch. 167, section 1; 1935, ch. 150, section 2; 1941, ch. 58, section 2; 1945, ch. 68, section 2; C. Supp. 1950, section 145.)

3-107. *State senatorial districts.*—Until the next enumeration and apportionment of voters, the following counties shall comprise the senatorial districts, to wit:

First district—Johnson, Carter, Unicoi, Greene and Washington.

Second district—Sullivan and Hawkins.

Third district—Hancock, Morgan, Grainger, Claiborne, Union, Campbell, and Scott.

Fourth district—Cocke, Hamblen, Jefferson, Sevier, and Blount.

Fifth district—Knox.

Sixth district—Knox, Loudon, Anderson, and Roane.

Seventh district—McMinn, Bradley, Monroe, and Polk.

Eighth district—Hamilton.

Ninth district—Rhea, Meigs, Bledsoe, Sequatchie, Van Buren, White and Cumberland.

Tenth district—Fentress, Pickett, Clay, Overton, Putnam, and Jackson.

Eleventh district—Marion, Franklin, Grundy and Warren.

Twelfth district—Rutherford, Cannon, and DeKalb.

Thirteenth district—Wilson and Smith.

Fourteenth district—Sumner, Trousdale and Macon.

Fifteenth district—Montgomery and Robertson.

Sixteenth district—Davidson.

Seventeenth district—Davidson.

Eighteenth district—Bedford, Coffee, and Moore.

Nineteenth district—Lincoln and Marshall.

Twentieth district—Maury, Perry and Lewis.

Twenty-first district—Hickman, Williamson and Cheatham.

Twenty-second district — Giles, Lawrence and Wayne.

Twenty-third district—Dickson, Humphreys, Houston and Stewart.

Twenty-fourth district—Henry and Carroll.

Twenty-fifth district—Madison, Henderson and Chester.

Twenty-sixth district—Hardeman, McNairy, Hardin, Decatur and Benton.

Twenty-seventh district—Gibson.

Twenty-eighth district—Lake, Obion and Weakley.

Twenty-ninth district — Dyer, Lauderdale and Crockett.

Thirtieth district—Tipton and Shelby.

Thirty-first district—Haywood and Fayette.

Thirty-second district—Shelby.

Thirty-third district—Shelby. (Acts 1901, ch. 122, Section 1; 1907, ch. 3, Section 1; Shan., Section 128; Code 1932, Section 146; Acts 1945, ch. 11, Section 1; C. Supp. 1950, Section 146.)

PROOF OF SERVICE

I, Z. T. OSBORN, JR., attorney in the firm BARKSDALE, HUDGINS AND OSBORN, attorneys of record for Gates Kidd and others, appellants herein, depose and say that on the 28 day of September, 1956, I served copy of the foregoing Jurisdictional Statements on George F. McCanless, appellee herein, by mailing the same to him in a duly addressed envelope with postage prepaid, the address being George F. McCanless, Esq., Attorney General for the State of Tennessee, 401 Seventh Avenue, North, Nashville, Tennessee.

Z. T. OSBORN, JR.
Attorney for Appellants
1316 Nashville Trust Bldg.
Nashville 3, Tennessee.

Sworn to and subscribed
before me this 28
day of September, 1956.

/S/ Harris Gilbert
Notary Public

My commission expires: 7/27/59

(Seal)

FILED
OCT 24 1956
JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 469.

GATES KIDD et al.,
Complainants-Appellants,
vs.
GEORGE F. McCANLESS, Attorney General,
Defendant-Appellee.

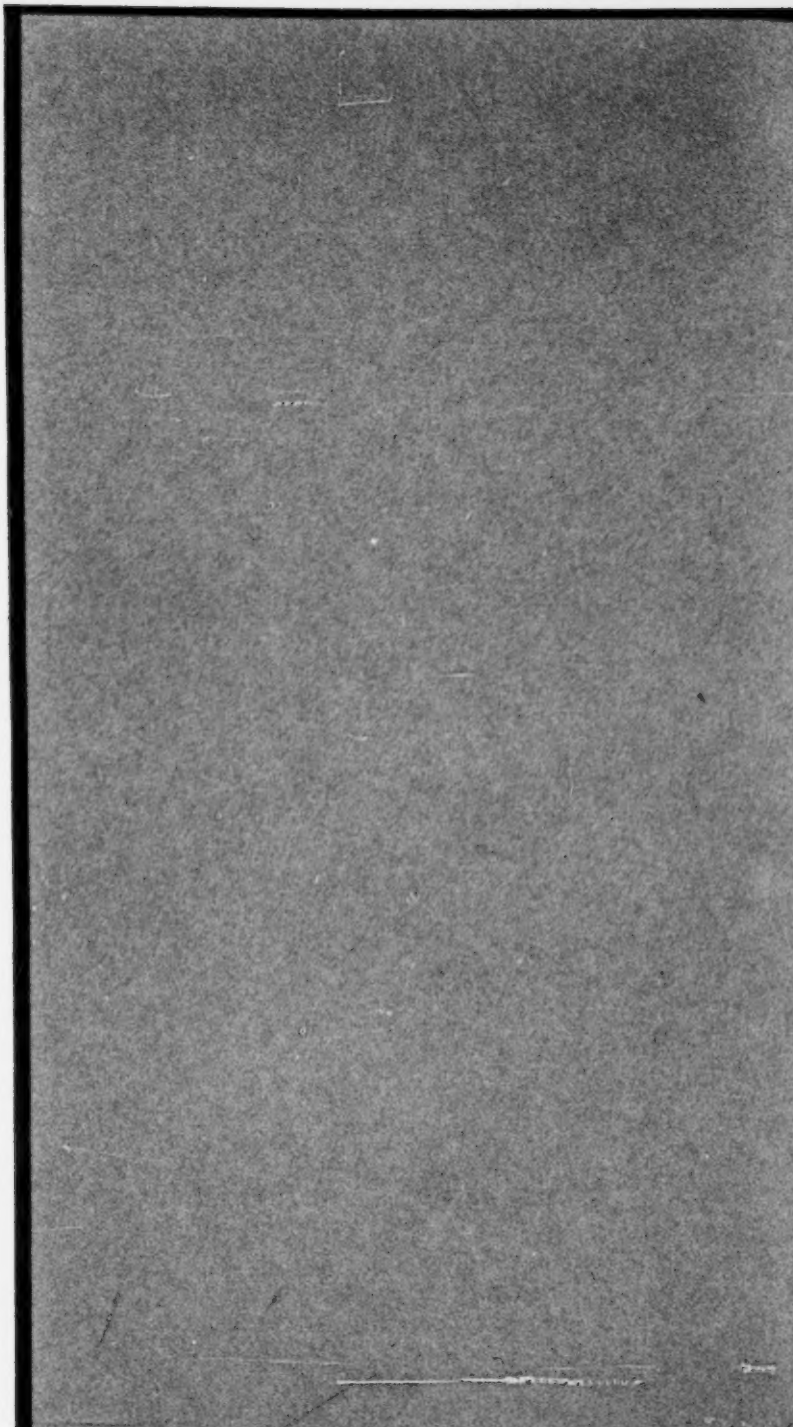
In the Supreme Court of Tennessee.
No. 36,651.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 469.

GATES KIDD et al., Complainants-Appellants, vs. GEORGE F. McCANLESS, Attorney General, Defendant-Appellee.	In the Supreme Court of Tennessee. No. 36,651.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS.

The appellee, George F. McCanless, Attorney General of Tennessee, for his statement in opposition to the appellants' statement of jurisdiction, and in support of his motion to dismiss, respectfully shows the following:

I.

STATEMENT OF ISSUES ON APPEAL.

This suit was commenced in the Chancery Court for Davidson County, Tennessee, by Gates Kidd and four other voters and residents of Washington County, six voters and residents of Carter County, and two voters and residents

of Davidson County against the Attorney General, the Secretary of State, the members of the Republican and Democratic State Primary Election Commissions, and the members of the Washington, Carter and Davidson County Election Commissions, challenging the validity of the laws enacted in 1901 which apportioned the State for seats in the General Assembly of Tennessee, a bicameral body. The Supreme Court of Tennessee reversed the holding of the Chancellor who declared that the apportionment statutes had expired with the passage of time, and held that it would not declare the statute unconstitutional since the result would be to disrupt the orderly processes of government.

The bill is lengthy but its allegations were accurately summarized by the Supreme Court of Tennessee as follows:

> ". . . By their bill they prayed, in addition to process and general relief, a declaratory judgment of the court declaring the Apportionment Act of 1901, as amended, to be unconstitutional for the following reasons: (1) No census of qualified voters was made as required by Section 4 of Article II of the Constitution; (2) the Act was unconstitutional and discriminatory when enacted; (3) the Senate Joint Resolution adopted by the Legislature in 1901 was not followed when said Act was enacted by the General Assembly; (4) the Apportionment Act of 1901 became unconstitutional and obsolete in 1911 because a new enumeration and apportionment was not made in that year; and (5) because the three counties where the complainants reside and vote are now entitled to greater representation in the Legislature than is afforded them by said Act. The bill alleges and charges because of this last assigned reason the respective complainants who reside and vote in their respective counties are denied the right to equal franchise and suffrage. The bill further alleges in support of these charges that a minority of approxi-

mately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives. The bill alleges also that the defendants will continue to conduct elections for members of the General Assembly according to said Act unless they are restrained by the court.

"The bill seeks an injunction restraining the defendants from holding any election under said alleged unconstitutional Act either in 1956 or thereafter. In the alternative the bill prays either (a) that a writ of mandamus issue ordering and compelling the defendants, State Board of Election, Democratic and Republican Primary Election Commissions, and the County Election Commissioners of Carter, Washington and Davidson Counties to prepare for a general election at large in 1956, wherein every qualified voter of the State would have an equal right to vote for every Representative and every Senator to serve in the 1957 General Assembly or any subsequent General Assembly, or (b) that by decree this Court mathematically reapportion the State of Tennessee and order the defendant Election Commissioners to prepare for and conduct the 1956 election of Representatives and Senators of the State in accordance with the decree mathematically reapportioning the State" (Appellants' Statement, pp. 3a-4a).*

The Republican State Primary Election Commission filed an answer and a cross bill. By the latter, the Governor and the members of the General Assembly of 1955 were made parties. The cross bill prayed that the Court require them to reapportion the State. On motion and demurrer the Chancellor dismissed the cross bill.

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* This is a reference to the Appellants' Jurisdictional Statement which contains the opinion of the Supreme Court of Tennessee.

The Attorney General demurred to the original bill upon the theory that a political or legislative question was presented. The jurisdiction of the Court was assailed for various reasons and the power of the Court to declare the rights of the parties, to grant any relief, to enter a decree reapportioning the State, or to hold or conduct an election to elect members of the General Assembly, was challenged. In substance and effect, the demurrers asserted the constitutionality of the apportionment laws because (1) the complainants are guilty of laches, since they waited 54 years to challenge them; (2) the orderly processes of government would be disrupted, since Tennessee would be without a General Assembly if the bill should be maintained; and (3) the bill did not state any reason for declaring the statutes unconstitutional.

The Chancellor sustained the bill, overruling those grounds of the demurrer defending the constitutionality of the statutes. The Attorney General prayed and was granted an appeal to the Supreme Court of Tennessee. The latter, pretermitting the issue of justiciability, held that the Chancellor erroneously overruled the tenth ground of the Attorney General's demurrer; i. e., the courts will not declare a statute unconstitutional if the result will be to disrupt the orderly processes of government. Therefore, the matter stands upon the technical record and without proof as to the merits.

By the attempt to appeal to this Court, the only question raised is whether the appellants have been denied equal protection of the laws within the meaning of the fourteenth amendment to the Constitution of the United States. They theorize that due to the increase and shifts in population, an elector's ballot is given more weight in some instances than in others because a member of the General Assembly may represent far more electors in some districts and counties than in others. In other words, they contend that some assembly districts are over-represented

while others are under-represented in the General Assembly on the basis of the total number of qualified voters in the respective districts. Relying upon the Federal population census of 1950, the appellants have alleged inequalities of representation although the State Constitution requires "an enumeration of qualified voters." Art. II, Sec. 4, Constitution of Tennessee, Appendix B. Nevertheless, the appellants insist that a majority of the General Assembly represents less than a majority of the qualified voters. This, they say, is undemocratic and denies them a republican form of government. They contend that the concept of "majority rule" is so ingrained into our constitutional system that they are denied equal protection under the laws as guaranteed by the Federal Constitution.

Also, the appellants argue that since a minority of the qualified voters elect a majority of the Assembly that their right of franchise is debased so that they are denied the right of equal suffrage in free and equal elections. They now attempt to invoke the jurisdiction of this Court, although the question presented is purely political and legislative.

Significantly, the bill fails to allege, and we do not understand that the appellants insist, that there is a prior valid apportionment law upon which to fall back if the present apportionment laws should be declared unconstitutional. There is no charge that any elector has been denied the right to cast his vote in a completely free election as guaranteed by the Constitution of Tennessee, Art. IV, Sec. 1, Appendix B. A lack of purity of the ballot box is not charged. There is no suggestion that every vote is not counted and accorded equal weight and dignity by those conducting elections. Neither is it averred that the members of the General Assembly are elected by less than a majority of the votes cast in the respective Assembly districts. Therefore, as we understand the law, the ap-

pellants are exercising every right of franchise to which they are entitled under the Constitution. Notwithstanding these, the appellants insist that they are the subjects of invidious discrimination at the ballot box.

II.

THE OPINION OF THE STATE COURT RESTS UPON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND.

In holding that to declare the apportionment laws unconstitutional would disrupt the orderly processes of government, the Supreme Court of Tennessee squarely based its opinion upon the broadest possible state ground. The Court logically and inescapably concluded:

> "The ultimate result of holding this Act unconstitutional by reason of the lapse of time would be to deprive us of the present legislature and the means of electing a new one and ultimately bring about the destruction of the state itself" (Appellants' Statement p. 9a).

The Court reasoned that once it was determined that the members of the General Assembly are not de jure officers they have no authority to act as de facto officers after judicial determination of their status. **Heard v. Ellio** 116 Tenn. 150, 92 S. W. 764; **Beaver v. Hall**, 142 Tenn. 41 217 S. W. 649; **Rideout v. State**, 161 Tenn. 248, 30 S. W 2d 255, 71 A. L. R. 830. The Court pointed out that whe the person or body is not acting in good faith and t public knows of the want of authority, there can be de facto doctrine. Thus, it follows that this attempt appeal should be dismissed because the state decision re upon an adequate and independent non-federal grou and this Court is without jurisdiction. **Black v. Cut Laboratories** (Cal., 1956), 76 S. Ct. 824; **Herb v. Pitca**

(Ill., 1945), 65 S. Ct. 459, 324 U. S. 117, 89 L. Ed. 789; **Enterprise Irrigating District v. Farmers Mutual Canal Co.** (Neb., 1917), 37 S. Ct. 318, 243 U. S. 157, 61 L. Ed. 644.

Further, it is immaterial whether the decision of the State Court is right or wrong since there is no assertion that the State Court adopted its view of the non-federal question in order to evade a federal constitutional issue, and the state decision has no relation to any federal question raised in the state courts. **Enterprise Irrigation District v. Farmers Mutual Canal Co.**, supra. There it is also said that this Court is without power to disturb such a judgment.

Neither can the decision of the State Court be reviewed unless the non-federal ground is unfounded. In **McCoy v. Shaw** (Okla., 1928), 48 S. Ct. 519, 277 U. S. 302, 72 L. Ed. 891, this Court declared:

> "It is settled law that a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved, and broad enough to sustain the judgment, **cannot be reviewed by this Court,** unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question." (Emphasis supplied.)

Although we think that the foregoing is sufficient to warrant the dismissal of the attempted appeal, we invoke another rule of law to sustain the position of the appellee.

The rule has long been recognized that the state courts have absolute power and authority to adjudicate the common law of the state and to construe the state statutes and Constitution. However, we quote from the unequivocating language of Mr. Justice Cardozo, who wrote:

> "A judgment by the highest Court of the State as to the meaning and effect of its own Constitution is decisive and controlling everywhere."

Highland Farms Dairy, Inc., v. Agnew (Va., 1937), 57 S. Ct. 549, 300 U. S. 608.

The application of the rule to the case at bar is obvious. The Supreme Court of Tennessee has decided that if the apportionment laws are held unconstitutional the State itself will be destroyed. This would necessarily result if the General Assembly is declared to be non-existent. Thereby, the basic framework of constitutional government in Tennessee would be destroyed. Instead of having three departments of government, the State would be reduced to two. Consequently, a democratic form of constitutional government as guaranteed by Art. IV, Sec. 4, Constitution of the United States, would end by a decision of this Court. Where such a result may be contemplated, it is inconceivable that the appellants would pursue the matter to the extent of asking this Court to destroy the government of the State. What more serious question involving a state constitution could there be?

The argument of the appellants that they are denied a republican form of government because a minority of the qualified voters may elect a majority of the members of the General Assembly is specious. It is generally known that candidates for public office are frequently elected by less than a majority of the votes cast in an election where there are many candidates, or in situations where less than a majority of the electorate votes in an election.

Speculation always arises in a presidential election year that one of the candidates may receive a majority of the popular vote but less than a majority in the electoral college.

A similar situation prevails in Georgia under the county unit voting plan and this Court has refused to disturb the system, as will be discussed later in this statement.

In any event, the appellants cannot raise the question of a republican form of government in this proceeding because the subject is beyond the scope of judicial power. **Ohio ex rel. Bryant v. Akron Metropolitan Park District** (Ohio, 1930), 50 S. Ct. 228, 281 U. S. 74, 74 L. Ed. 710, 66 A. L. R. 1460.

III.

NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE ATTEMPTED APPEAL.

No substantial federal question is presented by the appellants, who claim that their votes do not have as much weight as the votes of those who live in assembly districts having fewer qualified voters than in the districts in which the appellants reside. The gravaman of their complaint is that they do not have the opportunity to vote for as many members of the General Assembly as they think they should instead of the relative value of their voting rights. Thereby, a larger number of senators and representatives, representing the appellants' districts, would give them greater representation and more votes in the General Assembly. This is the real issue.

These are not the same rights which come within the purview of the equal protection clause of the fourteenth amendment. They are not the same political rights to which the cases refer when invidious and purposeful discrimination is condemned. Neither are they the rights of the character protected in the cases upon which the appellants rely in support of their position.

Snowden v. Hughes (Ill., 1944), 64 S. Ct. 397, 321 U. S. 1; **McPherson v. Blacker** (Mich., 1892), 13 S. Ct. 3, 146 U. S. 1, 36 L. Ed. 869; **Nixon v. Herndon** (Tex., 1926), 47 S. Ct. 446, 273 U. S. 536, 71 L. Ed. 759; **Nixon v. Condon** (Tex., 1932), 52 S. Ct. 484, 286 U. S. 73, 76 L. Ed. 984, 88 A. L. R. 458, are cited. The Snowden and Nixon cases were brought by

individuals to obtain damages for the infringement of civil rights.

In McPherson, this Court refused to apply the equal protection clause to a Michigan statute which provided for the election of presidential electors by congressional districts instead of the state at large. In discussing the object of the fourteenth amendment and voting rights, the Court emphasizes:

> "The object of the fourteenth amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not radically change the whole theory of the state and federal governments to each other, and both governments to the people" (146 U. S. 39).
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> * * * * * * *
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> "If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made" (146 U. S. 40).

There is no discrimination as to any elector's right of franchise in Tennessee within the doctrine of the McPherson case.

The case of **Thomas v. Reid** (1930), 142 Okla. 38, 285 Pac. 92, is of importance only in its holding that a statute requiring approval of 60% of the voters for the sale of a municipal power plant violates the Constitution of Oklahoma. Likewise, the case of **Maynard v. Board of Canvassers** (1890), 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 32, is authority only for the proposition that cumulative voting is impliedly prohibited by the Michigan Constitution. Neither case supports the appellants' position in this Court nor may be considered an authority holding that this Court has jurisdiction in this instance.

In **Cook v. State** (1891), 90 Tenn. 407, 116 S. W. 471, the Court upheld the constitutionality of a statute making it a criminal offense to remove ballots, to assist electors in marking their ballots, or to instruct them how to vote.

Construing the Organic Act of Hawaii, 48 U. S. C. A., Sec. 491, which requires reapportionment from "time to time" in **Dyer v. Abe** (1956), 138 F. Sup. 220, the Federal District Court held that the plaintiff, a voter, had been denied equal protection of the laws due to the failure of the territorial legislature to reapportion the territory. Painstakingly, the Court emphasizes the difference between a "federal-territorial" relationship and a "federal-state" relationship, and, upon this distinction, differentiates the case from **Colgrove v. Green** (1946), 66 S. Ct. 1198, 326 U. S. 459, 90 L. Ed. 1432, where reapportionment was held to be a political question.

In the eight cases cited there is not one which holds that this Court has jurisdiction in a case similar to the one at bar. None of the cases holds that the reapportionment of a state presents a federal question and none supports the jurisdiction of this Court.

In the absence of a substantial federal question, this Court will dismiss an attempted appeal for lack of jurisdiction. **Hulbert v. Chicago** (Ill., 1906), 26 S. Ct. 617, 201 U. S. 275; **Zucht v. King** (Tex., 1922), 43 S. Ct. 24, 260 U. S. 174.

IV.

REAPPORTIONMENT IS A POLITICAL QUESTION.

The appellee reiterates the contention that the character of the political question presented here is not the same as those cases where relief is granted for a private wrong.

The problem presented in this case affects the people of Tennessee as a body politic and sovereign. This is not a damage suit as were the Snowden and Nixon cases. This distinction was recognized in **Colgrove v. Green** where the Court stated that the basis of the suit is ". . . a wrong suffered by Illinois as a polity."

The Colgrove decision clearly supports the appellee's position in this case, and the question of reapportioning congressional districts is patently stronger than one involving the reapportionment of the general assembly of a state.

Subsequently, the Court decided **MacDougall v. Green** (1948), 69 S. Ct. 1, 335 U. S. 281, where this Court held in a per curiam opinion that an Illinois statute requiring a qualifying petition for a candidate for a new political party to be signed by 25,000 qualified voters, including 200 qualified voters from 50 counties does not violate the Fourteenth Amendment.

Again, the principle of these cases was approved and affirmed in **South v. Peters** (1950), 70 S. Ct. 641, 339 U. S. 276, 94 L. Ed. 834, where Georgia's county unit system of voting was challenged in the Federal District Court. In affirming the District Court, which dismissed the appellants' petition, this Court in a per curiam opinion asserted,

> ". . . Federal Courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." 339 U. S. 277.

This pronouncement by this Court did not satisfy those who would assault Georgia's county unit laws. A suit was then filed in the state court making a similar attack. **Cox v. Peters** (1951), 208 Ga. 498, 67 S. E. 2d 579. The insistence, among others, in the state court was that the

petitioner's vote had not received its full value in violation of the equal protection clause of the fourteenth amendment. Holding that a party primary is not an election within the statutes and constitution, the Supreme Court of Georgia denied relief in damages for the infringement of his civil rights. Thereupon, the petitioner, Cox, sought to appeal to this Court. The appellee's motion to dismiss was granted and the Court announced ". . . the appeal is dismissed for the want of a substantial federal question." **Cox v. Peters** (Ga., 1952), 72 S. Ct. 559, 342 U. S. 936, 96 L. Ed. 697. Also, see, **Turmon v. Duckworth** (D. C. Ga., 1946), 68 F. Supp. 744, appeal dismissed 67 S. Ct. 21, 329 U. S. 675, 91 L. Ed. 596, rehearing denied 67 S. Ct. 296, 329 U. S. 829, 91 L. Ed. 704; **Cook v. Fortson** (D. C. Ga., 1946), 68 F. Supp. 624, appeal dismissed 67 S. Ct. 21, 329 U. S. 675, 91 L. Ed. 596, rehearing denied 67 S. Ct. 296, 329 U. S. 839, 91 L. Ed. 703.

The insistence that a vote has no weight when cast in a county in Georgia for a candidate receiving less than a majority is more compelling than the contention made in this case that the voter is denied equal voting strength in the General Assembly. Yet, the equal protection clause affords no relief for the Georgia voter.

Clearly, we think, the decisions of this Court declare the problem of reapportionment to be a political question which should be addressed to the people of Tennessee and their General Assembly. The Constitution of Tennessee belongs to its people. They are capable of determining political and governmental issues arising in connection with their state government. They should be permitted to resolve the question of reapportionment in their own way.

Wherefore, the appellee respectfully moves that the within appeal be dismissed or that the judgment and de-

cree of the Supreme Court of the State of Tennessee be affirmed.

.....
JACK WILSON,

.....
JAMES M. GLASGOW,
Assistant Attorneys General of Tennessee,
Attorneys for the Appellee.

Certificate of Service.

The undersigned, a member of the Bar of the Supreme Court of the United States and one of the counsel of record for the appellee, hereby certifies that on the ..... day of October, 1956, he served the within and foregoing statement in opposition to the appellants' statement of jurisdiction and motion to dismiss on Gates Kidd et al., appellants, by depositing at the Post Office at Nashville, Davidson County, Tennessee, two copies each of the within and foregoing statement securely enclosed in an envelope, postage duly prepaid, addressed to one of the attorneys of the appellants at his post office address as stated below, that is to say, Honorable Z. T. Osborn, Jr., Barksdale, Hudgins and Osborn, 1316 Nashville Trust Building, Nashville 3, Tennessee.

.....
James M. Glasgow,
Assistant Attorney General.

Mailing address:
Supreme Court Building,
Nashville, Tennessee.

APPENDIX A.

Constitution of Tennessee.

Article II.

Sec. 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive and Judicial.

Sec. 2. Limitation of powers.—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Sec. 3. Legislative authority—Term of office.—The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. Census.—An enumeration of the qualified voters, and an apportionment of the Representatives in the General Assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. Apportionment of representatives.—The number of Representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the State shall be one million and a half, and shall never exceed ninety-nine; Provided that any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6. Apportionment of senators.—The number of Senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the Senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the House of Representatives, shall be made up to such county or counties in the Senate, as near as may be practicable. When a district is composed of two or more counties, they shall be adjoining; and no county shall be divided in forming a district.

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APPENDIX B.

Constitution of Tennessee.

Article IV.

Sec. 1. Right to vote—Election precincts—Military duty.—Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.

The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box.

All male citizens of this State shall be subject to the performance of military duty, as may be prescribed by law.